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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TOBIAS WEISS, GERTRUDE O. WEISS,

Petitioners,

—v.—

EL AL ISRAEL AIRLINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a common-law tort claim, for physical abusive treatment by an airline of passengers at the airline terminal, preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), which prohibits a state or any of its subdivisions from enacting or enforcing any provision "related to a price, route, or service" of an air carrier.

More pointedly, does that statutory prohibition of state action regarding airline "service", prohibit the common-law tort claim.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tobias Weiss and Gertrude O. Weiss, husband and wife, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The order of the United States Court of Appeals for the Second Circuit is reported at 2009 WL 367559 (C.A.2 (N.Y.)), and is reproduced in the Appendix annexed hereto.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was entered on February 13, 2009. This petition is being filed within ninety days of that order. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The tort claim involved in this case is set forth in the Second Count of the complaint. It is NOT based on the "bumping" or failure to provide the air transportation. The tort claim is based on abusive treatment by the airline at the terminal after it failed to provide any air transportation for plaintiffs during a period of two days even though they had tickets and reserved seats.

THE COMPLAINT

The plaintiffs bought two tickets, with confirmed reserved seats, for transportation by the defendant airline from New York City (Kennedy) to Jerusalem at a cost of $2,434. The scheduled departure was on March 31, 2004 at 6:30 P.M.

Plaintiffs arrived at defendant's terminal at Kennedy at 5:28 P.M. on March 31, 2004, and were cleared for boarding by the airline security. They were then told that their seats had been given to other persons, and they were denied boarding on the plane for which they had tickets.

The reason for the airline's exclusion of the plaintiffs from their ticketed flight is that the airline deliberately sold more tickets for that flight than it had seats on the plane, deliberately overbooking the flight, and then engaged in the practice of "bumping" passengers from the flight even though they had reserved seats on it.

The airline then induced the plaintiffs to remain for two days at the airline terminal. They were put on standby status by the airline, and were otherwise induced by the airline to remain there at its terminal until 11:30 in the evening on March 31 and April 1, 2004. The airline nevertheless refused to give any transportation to plaintiffs during those two days.

Plaintiffs then bought the needed transportation to Israel on British Airways.

The airline never informed plaintiffs that it engaged in overbooking and bumping when they bought their reserved seat tickets for that flight. No notice was included with the tickets that the flight would be overbooked and there would be bumping.

The airline failed to display at its terminal any notice of its overbooking practices, its procedure for loss of seating, or for compensation to the affected passengers, and failed to give required statements to plaintiffs.

Nor was any reimbursement made to plaintiffs for the cost of the tickets for which plaintiffs were refused transportation.

In the Second Count, a common law cause of action is alleged for physical and emotional suffering inflicted by the airline during the two days it induced plaintiffs to remain at its terminal. For two days, the airline had plaintiffs move around repeatedly in trying to deal with airline employees to give them transportation to Jerusalem. The attitude of the airline and its employees toward plaintiffs throughout those two days was indifferent, shunting plaintiffs and their baggage from place to place just to get rid of them. The result of those two days of abusive treatment and hardship, imposed by the airline on plaintiffs, was a failure of the airline to furnish any transportation to plaintiffs.

REASONS FOR GRANTING THIS PETITION AND REVIEW BY THE SUPREME COURT

This case and its questions of law should be reviewed and settled by the Supreme Court because there is a conflict in the rulings of the courts of appeals, and that conflict should be resolved. Further, there is involved the scope and meaning of a federal statute (§ 105 of the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1)) which is important for airline transportation.

The Court of Appeals, in this case, in its opinion expressly recognized that it was in conflict with the position of the Court of Appeals for the Third Circuit and in conflict with the Court of Appeals for the Ninth Circuit, *citing Taj Mahal Travel, Inc.* v. *Delta Airlines Inc.*, 164 F.3d 186 (3d Cir. 1998) and *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. (1998).

We further respectfully rely on the following opinion of Justice O'Connor (at 531 U.S. 1058), joined by Chief Justice Rehnquist and Justice Thomas, in dissenting from the denial of certiorari in *Northwest Airlines, Inc.* v. *Duncan*, 208 F.3d 1112 (9th Cir. 2000):

> "JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.
>
> "The petition for a writ of certiorari in this case presents an important issue that has divided the Courts of Appeals: the meaning of the term "service" in the portion of the Airline Deregulation Act of 1978 (ADA) that pre-empts any state law "related a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). I would grant the petition to resolve this issue and bring needed certainty to this area of the law.
>
> "We have addressed the scope of the ADA's pre-emption provision on two prior occasions. In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992), we noted the "broad pre-emptive purpose" of the ADA. And while we have never directly addressed the definition of "service" within the meaning of § 41713(b)(1), we have suggested that this term encompasses

"access to flights and class-of-service upgrades." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 226 (1995). The Courts of Appeals, however, have taken directly conflicting positions on this question of statutory interpretation.

"The Ninth Circuit below, adhering to its decision in *Charas* v. *TWA*, 160 F. 3d 1259 (1998) (en banc), held that the term "service" encompasses " 'the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail,' " but not the " 'provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.' " 208 F. 3d 1112, 1114-1115 (2000) (quoting *Charas*, *supra*, at 1261). The Third Circuit has expressly agreed with this approach. *Taj Mahal Travel, Inc.* v. *Delta Airlines Inc.*, 164 F. 3d 186, 194 (1998). In contrast, three Courts of Appeals have adopted a much broader definition. See *Hodges* v. *Delta Airlines, Inc.*, 44 F. 3d 334, 336 (CA5 1995) (en banc) (defining "service" in terms of the " '[contractual] features of air transportation,' " including " 'ticketing, boarding procedures, provision of food and drink, and baggage handling' "); *Smith* v. *Comair, Inc.*, 134 F. 3d 254, 259 (CA4 1998) ("Undoubtedly, boarding procedures are a service rendered by an airline") (citing *Hodges*, *supra*, at 336); *Travel All Over The World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F. 3d 1423, 1433 (CA7 1996) (adopting *Hodges* definition). See also *Chukwu* v. *Board of Directors British Airways*, 889 F. Supp. 12, 13 (Mass. 1995), aff'd mem., 101 F. 3d 106 (CA1 1996) (same).

"Given these opposing interpretations, I believe we should hear this case. The legal issue is an important one, well suited for resolution by this Court. The two leading cases, *Charas* and *Hodges*, are both the product of en banc consideration. They have fully explored the relevant considerations, including the language and history of the ADA and its pre-emption clause, as well as the policies supporting the possible interpretations of the term "service." Compare *Charas*, *supra*, at 1262-1266, with *Hodges*, *supra*, at 336-339.

"Resolution of this question would provide needed certainty to airline companies. While this case involves the potential pre-emption of a state law personal-injury claim based on an airline's smoking policy, the legal principle at stake has ramifications for a host of other tort actions against airlines. See, *e.g.*, *Smith*, *supra* (false imprisonment and intentional infliction of emotional distress); *Travel All* Over *The World*, *supra* (defamation). Because airline companies operate across state lines, the divergent pre-emption rules formulated by the Courts of Appeals currently operate to expose the airlines to inconsistent state regulations. Cf. *Morales*, *supra*, at 378 (the ADA's pre-emption provision is intended "[t]o ensure that the States would not undo federal deregulation with regulation of their own").

"A decision from this Court would provide needed clarification on this discrete and important issue of statutory interpretation. Accordingly, I respectfully dissent from the denial of the petition for certiorari."

CONCLUSION

For the foregoing reasons, review by the Supreme Court is respectfully requested.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-4113-cv
Filed February 13, 2009
Issued as Mandate: March 9, 2009

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF

THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of February, two thousand nine.

PRESENT:

HON. ROBERT D. SACK,
HON. BARRINGTON D. PARKER,
Circuit Judges,

HON. DENISE COTE,*
District Judge.

TOBIAS WEISS, GERTRUDE O. WEISS,

Plaintiffs-Appellants,

—v.—

EL AL ISRAEL AIRLINES,

Defendant-Appellee.

---

* The Honorable Denise Cote of the United States District Court for the Southern District of New York, sitting by designation.

Appearing for Appellants:

Tobias Weiss, Law Office of Tobias Weiss, Esq., Stamford, CT (acting for his wife, and for himself *pro se*).

Appearing for Appellee:

Lawrence Mentz, Kaplan, von Ohlen & Massamillo, LLC (Jeanine C. Driscoll, of counsel), New York, NY.

Appeal from the United States District Court for the Southern District of New York (Gerard E. Lynch, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

The plaintiffs Tobias and Gertrude Weiss (Mr. Weiss, a lawyer, appears for himself and for his wife Gertrude) attempt to assert a tort claim arising from the conduct of defendant El Al Israel Airlines ("El Al") in "bumping" the Weisses from their scheduled flight to Israel from John F. Kennedy International Airport, i.e., refusing to seat them because of a full aircraft even though they were ticketed and had confirmed reservations on the flight. El Al asked the Weisses to return to the airport on two subsequent days, but ultimately failed to provide them with seats on a later flight. The district court ruled that this claim was preempted by section 105 of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1). The Weisses appeal this determination. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"The district court's determination regarding preemption is a conclusion of law, and we therefore review it de novo." *Drake v. Laboratory Corp. of Am. Holdings*, 458 F.3d 48, 56 (2d Cir. 2006).

ADA section 105 provides, *inter alia*, that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The parties agree that a common-law tort action is a "law, regulation, or other provision having the force and effect of law" within the meaning of the statute. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (common-law tort suits can be preempted by the ADA). The issue is therefore whether or not El Al's treatment of the Weisses related to El Al's "service."

The plaintiffs base their claim on the rule adopted by the Ninth and Third Circuits to the effect that "service[s]" under section 105 means only air transportation. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc) (interpreting "service" to refer only to "the provision of air transportation to and from various markets at various times"); *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 193-94 (3d Cir. 1998) (similar). But in *Air Transport Association of America, Inc. v. Cuomo*, 520 F.3d 218 (2d Cir. 2008) ("*ATA*"), we explicitly rejected that approach on the grounds that it was "inconsistent with the Supreme Court's recent decision in *Rowe [v. New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989 (2008), where] the Court necessarily defined 'service' to extend beyond prices, schedules, origins, and destinations." *ATA*, 520 F.3d at 223. We therefore held "that requiring airlines to provide food, water, electricity, and

restrooms to passengers during lengthy ground delays does relate to the service of an air carrier," noting that a majority of the circuits had found the term "service" to "refer[ ] to the provision or anticipated provision of labor from the airline to its passengers and [to] encompass[ ] matters such as boarding procedures, baggage handling, and food and drink." *Id.*

The El Al actions challenged by the plaintiffs related "to the provision or anticipated provision of labor from the airline" within the meaning of *ATA*. Though the plaintiffs were not ultimately seated on any El Al flight, this circumstance was foreseen by the *ATA* court, as indicated by its use of the phrase "*anticipated* provision of labor" (emphasis added). Moreover, this case falls squarely within the rationale of *ATA*, which, relying on *Rowe*, stressed Congress's "overarching goal" of "assur[ing] that transportation rates, routes, and services reflected maximum reliance on competitive market forces, thereby stimulating . . . efficiency, innovation, and low prices." *ATA*, 520 F.3d at 222-23 (internal quotation marks and alteration omitted). Like an airline's failure to provide food or water to passengers stranded on the runway (which was at issue in *ATA*, *see ATA*, 520 F.3d at 220), the practice of "bumping," although notoriously maddening to passengers, is a practice subject to competitive market forces. We therefore conclude that El Al's actions related to the airline's "service," and that the plaintiffs' tort claim is thus preempted by section 105 of the ADA so that any limitations on the practice of which the plaintiffs complain must be imposed by the federal government and not the state.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ RICHARD ALCANTARA
Richard Alcantara, Deputy Clerk

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk

by /s/ MARGARET LAIN
DEPUTY CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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04 Civ. 9803 (GEL)

TOBIAS WEISS and GERTRUDE O. WEISS,

Plaintiffs,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

FINAL ORDER OF DISMISSAL

WHEREAS, on May 22, 2006, the Court denied in part and granted in part the motion of defendant El Al Israel Airlines, Ltd. for summary judgment as ordered in *Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361 (S.D.N.Y. 2006), and dismissed the First Count and Second Count of the Complaint; and

WHEREAS, the parties have reached a settlement of the claim asserted in the Third Count of the Complaint, without any admission of liability on the part of defendant El Al Israel Airlines, Ltd.; and

WHEREAS, the plaintiffs have expressly reserved a right to appeal dismissal of the First Count and the

Second Count of the Complaint pursuant to the Order of May 22, 2006.

IT IS HEREBY ORDERED that, this action is dismissed.

/s/ GERARD E. LYNCH
U.S.D.J.

Dated: New York, New York
August 31, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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04 Civ. 9803 (GEL)

TOBIAS WEISS and GERTRUDE O. WEISS,

Plaintiffs,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

Tobias Weiss, *pro se*, *Plaintiff*.

Lawrence Mentz, Kaplan, von Ohlen & Massamillo, LLC, New York, New York, *for Defendant*.

OPINION AND ORDER

GERARD E. LYNCH, *District Judge*:

Plaintiffs Tobias and Gertrude Weiss bring this action against defendant El Al Israel Airlines ("El Al") to recover losses they suffered after being "bumped" from a flight from New York to Jerusalem on March 31, 2004. In a prior opinion, this Court dis-

missed the second count of plaintiffs' complaint—a tort claim—because the Airline Deregulation Act ("ADA") preempts such causes of action. *Weiss v. El Al Israel Airlines, Ltd.*, No. 04 Civ. 9803, 2006 WL 1409736, at *7 (S.D.N.Y. May 22, 2006). Plaintiffs now move for reconsideration of the dismissal of their tort claim. For the following reasons the motion will be denied.

BACKGROUND

Because the factual background of this case is set forth in detail in the Court's prior opinion, *see Weiss*, 2006 WL 1409736, at *1, the facts can be sketched briefly here. Essentially, plaintiffs purchased two round-trip tickets for transportation from New York's John F. Kennedy Airport ("JFK") to Jerusalem's Ben-Gurion Airport, departing JFK at 6:30 p.m. on March 31, 2004. Plaintiffs arrived at JFK and passed through security in sufficient time to catch their flight, but as the result of overbooking plaintiffs were bumped from their contracted departure. El Al placed plaintiffs on a standby list to enable them to obtain available seats on a subsequent departure, and plaintiffs paid $100 to upgrade their seats to business class on the future flight. Plaintiffs spent two days in the airport on standby status, during which time they allege that they suffered physical and emotional fatigue and exhaustion from walking from place to place required to comply with the airline's standby procedures, and were treated in a "wanton, oppressive, indifferent, and uncaring" manner by the airline's employees. (Compl. ¶ 23.) Finally, unable to acquire seats on any El Al flight, plaintiffs purchased tickets on another

airline. Subsequently, plaintiffs filed this action, with the second count of their complaint seeking recovery in tort for defendant's "damages to [plaintiffs] for their physical and emotional suffering and great inconvenience caused by the airline[ ] . . . during those two days for which the airline induced the passengers to remain at the airport." (Compl. ¶ 25.)

DISCUSSION

In its prior ruling, the Court dismissed the second count of the complaint, stating that it was "clearly preempted by the ADA," *Weiss*, 2006 WL 1409736, at *7, which preempts suits based on state law with any " 'connection with or reference to airline rates, routes or services,' " *id.*, *quoting Morales v. Trans World Airlines, Inc.*, 504 U.S. 347, 384 (1992). Plaintiffs then filed the present motion, claiming that, because they never received passage aboard an El Al flight, their two days of abusive treatment were in fact not related to any service provided by the airline. Accordingly, plaintiffs argue that the ADA does not help El Al, because the ADA fails to preempt state law claims that are not connected to rates, routes, or services.

Plaintiffs' argument fails for two reasons. First, plaintiffs are barred from raising this argument because it was not presented to the Court in connection with the original motion to dismiss. Second, even if plaintiffs had raised the argument in a timely manner, it is without merit, because the allegedly abusive treatment plaintiffs suffered was connected to airline service, and is therefore preempted by the ADA.

I. Plaintiffs' New Argument Is Untimely

Reconsideration of a decision pursuant to Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3 is appropriate "only where there is an intervening change of controlling law, newly available evidence, or the need to correct a clear error or prevent manifest injustice." *In re Salomon Winstar Litig.*, 02 Civ. 6171 (GEL), 2006 WL 510526, at *1 (S.D.N.Y. Feb. 28, 2006); *see also Slue v. N.Y. Univ. Med. Ctr.*, 04 Civ. 2087 (GEL), 2006 WL 212294, at *1 (S.D.N.Y. Jan. 26, 2006). A motion for reconsideration is not an opportunity for a losing party to advance new arguments to supplant those that failed in the prior briefing of the issue. *EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 199 (E.D.N.Y. 2003) ("Under Local Rule 6.3, a party may not advance new facts, issues or arguments not previously presented to the Court." (internal quotation marks omitted)).

Plaintiffs do not claim that there has been an intervening change of controlling law, or that there is newly available evidence, or that this Court's prior opinion resulted in some form of manifest injustice. Rather, plaintiffs simply emphasize a new argument—that their suffering was not related to a service—in contrast to their prior emphasis on the harm they suffered and the difference between bumping and delay.

In their prior briefing, plaintiffs did note the fact that El Al ultimately provided them with no transportation. However, this issue was raised not in the context of the ADA, but in the context of the distinction between bumping and delay under the Montreal Convention. (Pl. Memo. Op. Mot. Dis. 5-11.) Plaintiffs argued that claims based on delay, which involve eventual transportation, are preempted by

the Montreal Convention, but claims based on bumping, which involve cancellation of the desired transportation, are not preempted. While this is an important distinction for the purposes of the Montreal Convention and for plaintiff's first and third counts, it is not germane to the question of whether bumping and subsequent actions by airline employees constitute service in the context of the ADA. Indeed, in their prior briefing plaintiffs only mentioned the ADA to say that it was the basis of one of defendant's arguments (*id.* at 4), and made vague conclusory assertions that tort causes of action are not preempted by federal statues (*id.* at 12-13).

Nowhere in their prior briefing did plaintiffs advance the argument they make now—that bumping and attempts to obtain seats on later flights are not services. This is a new argument, and accordingly it is not an appropriate ground for a motion for reconsideration.

II. Plaintiffs' New Argument is Without Merit

In any event, even if plaintiffs were permitted to raise their new argument, it is without merit, because El Al's alleged mistreatment of plaintiffs was connected with airline services. Accordingly, the Court reaffirms its holding that plaintiffs' second count "is clearly preempted by the ADA, and is dismissed." *Weiss*, 2006 WL 1409736, at *7.

Plaintiffs do not dispute that claims relating to airline services are preempted by the ADA.[1] While the

[1] Plaintiffs argue "that the Second Count of the complaint does not relate to a 'price' or 'route' of the air carrier," and that "[i]f that preemptive provision could have any application to the Second Count of the complaint, it can only be with respect to the category of a 'service' of the air carrier." (Pl. Mem. Recon. 3.)

Supreme Court has clearly stated that the ADA preempts claims in "connection with or reference to airline . . . services," *Morales*, 504 U.S. at 384, neither the Supreme Court nor the Second Circuit have provided a definition for just what sorts of activities constitute airline services. *Galbut v. American Airlines, Inc.*, 27 F. Supp. 2d 146, 151 (E.D.N.Y. 1997). In the absence of direct guidance from the Supreme Court or the Court of Appeals, district courts have developed two similar yet distinct methods for making this determination. One line of cases, exemplified by *Trinidad v. American Airlines, Inc.*, 932 F. Supp. 521, 524-37 (S.D.N.Y. 1996), employs an ad hoc approach, whereby courts examine the totality of the circumstances and determine whether the action at issue is commonly related to air travel. The second line of cases employs the three part test laid out by then District Judge Sotomayor in *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 221 (S.D.N.Y. 1994). While these two different methods can produce different results in certain circumstances, this Court need not attempt to synthesize the two approaches or adopt a specific approach, because plaintiffs' tort claims in the instant action are preempted under either standard.

Under the first line of cases, the key to determining whether actions by airline personnel are "services" is the extent to which those actions are commonplace and ordinary, and relate directly to air travel. *Trinidad*, 932 F. Supp. at 524-26 (collecting cases). For example, aiding an elderly passenger off one plane and onto a connecting flight is common, so it is a service, and accordingly, there is preemption when an aged, infirm passenger is left aboard his original flight until it reaches its final destina-

tion, where he ultimately dies. *Howard v. Northwest Airlines, Inc.*, 793 F. Supp. 129 (S.D. Tex. 1992). However, it is not common, and thus not an airline service, for a captain to give ground personnel information regarding a passenger who was allegedly smoking marijuana in the airplane's bathroom. Therefore, when ground personnel restrain and mistreat the offending passenger, it is not an airline service, and there is no preemption. *Curley v. American Airlines, Inc.*, 846 F. Supp. 280 (S.D.N.Y. 1994).

However, under this first line of cases, ADA preemption will not apply even to actions that are regularly performed, if the plaintiff alleges that the action was performed in a negligent manner and resulted in personal injury. In *Trinidad*, Judge Scheindlin explained that tort claims are not preempted when they relate to common law negligence and personal injury because Congress omitted "safety" from the language of the ADA's preemption statute. *Id.* at 526. Thus, tort claims are not preempted when the harm alleged was the result of services performed in an unsafe, negligent way, such as personal injuries resulting from pilots negligently flying into severely turbulent weather, *Trinidad*, 932 F. Supp. at 521, hearing loss resulting from a plane that ascends too rapidly, *O'Hern v. Delta Airlines, Inc.*, 838 F. Supp. 1264 (N.D. Ill. 1993), injuries resulting from tripping on a negligently maintained floor near a jetway, *Butcher v. City of Houston*, 813 F. Supp. 515 (S.D. Tex. 1993), or injuries resulting from baggage that falls from a negligently maintained overhead compartment. *Heller v. Delta Air Lines, Inc.*, 92 Civ. 1937, 1993 WL 330093 (S.D.N.Y.

Aug 25, 1993); *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318 (E.D. Mich. 1993).[2]

Under this first line of cases, plaintiffs' claim is related to common and ordinary actions, and therefore it is related to an airline service and preempted by the ADA. Unfortunately, bumping passengers and then making them wait in airport terminals for extended periods of time is a common occurrence. Plaintiffs were not held against their will, but remained in the terminal on a standby list, meaning defendant was engaged, at least slightly, in providing a common service to plaintiffs. During this time defendant took money for the purpose of upgrading plaintiffs' seats, and plaintiffs were "constantly caught up in dealing with airline employees and in complying with airline procedures to gain admission to a flight to Israel." (Comp. ¶ 21.)

Furthermore, plaintiffs' claims are not based on common law negligence or personal injury. Rather, plaintiffs assert that they were treated poorly by airline employees implementing airline policies in an attempt to get plaintiffs on another flight. Despite the fact that the ultimate goal of obtaining transit for plaintiffs was not fulfilled, El Al was performing common airline services for plaintiffs related to air travel, and plaintiffs' claim that El Al preformed

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[2] Plaintiffs rely on *Stone v. Frontier Airlines Inc.*, 256 F. Supp. 2d 28 (D. Mass. 2002), for the proposition that tort claims, as a general matter, are not preempted. Plaintiffs read too much into *Stone*. The *Stone* Court recognized that a failure to have defibrillators aboard an airline was a safety issue, *id.* at 34, 40, and that in-flight emergency medical treatment was not a common service related to flight, *id.* at 38-39. Accordingly, for those reasons, and not simply because the plaintiff's claim arose under tort law, the Court concluded that the claim was not preempted.

ineptly or rudely, or even failed in the end to provide the services contracted for, is necessarily a claim in "connection with or reference to airline ... services," *Morales*, 504 U.S. at 384. Accordingly, plaintiffs' claim is preempted by the ADA. *See Nazarian v. Compagnie Nationale Air France*, 989 F. Supp. 504, 510 (S.D.N.Y. 1998) ("ticketing, boarding, in-flight services, or the implementation of airline policies, such as 'bumping' of passengers, denial of boarding, and segregation of smoking passengers, relate to services and are preempted."), *citing Trinidad*, 932 F. Supp. at 526.

The second approach to ADA preemption follows Judge Sotomator's *Rombom* test. As one court explained, to apply this test:

> The Court must first determine whether the activity at issue in the claim is a service. If the activity is deemed to be a service, the court must then ascertain whether the claim affects the airline service directly or tenuously, remotely, or peripherally. Finally, the Court must determine whether the underlying tortious conduct was reasonably necessary to the provision of the service.... "[I]f the tortious act did not occur during the service ... or ... did not further the provision of a service in a reasonable manner, then the state tort claim should continue."

Galbut v. American Airlines, Inc., 27 F. Supp. 2d 146, 152 (E.D.N.Y. 1997), *quoting Rombom*, 867 F. Supp. at 222.

The first prong of the *Rombom* test is quite similar to *Trinidad*'s approach to ADA preemption, in that the determination of service rests heavily on the

extent to which the activity in question is ordinary and relates directly to air travel. As noted in *Rombom*, preemption applies to claims that grow out of an airline's refusal to board a passenger—because that is a service related to air travel—but not to claims based on injuries sustained on a tour bus provided by an airline as part of a vacation package because ground transportation is not related to air travel. 867 F. Supp. at 221-22, *citing Williams v. Express Airlines I, Inc.*, 825 F. Supp. 831, 833 (W.D. Tenn. 1993) (refusal to board), and *Chouest v. American Airlines, Inc.*, 839 F. Supp. 412, 415-16 (E.D. La. 1993) (bus injuries not preempted). As discussed above, defendant's actions here at issue were common and ordinary, and were therefore a service, thus satisfying the first prong of the inquiry.

With respect to the second prong, plaintiffs' tort claims arise from the fatigue and exhaustion they suffered "in having to move about the airline's facilities in response to the airline procedures and the suggestions of its employees." (*Id.* at ¶ 22.) Accordingly, plaintiffs' claims go directly—not remotely or tenuously—to the poor treatment they received while the airline was rendering that service, and therefore the second prong of the *Rombom* test is satisfied.

As to the third prong, El Al's alleged conduct was not sufficiently unreasonable so as to exempt plaintiffs' claim from ADA preemption. While Judge Sotomayor used the phrase "reasonably necessary" to describe the actions that would remain subject to preemption, *Rombom*, 867 F. Supp. at 222, this prong has been applied only to exempt from preemption actions that are "outrageous or unreasonable," *id.* at 223; *see also Galbut*, 27 F. Supp. 2d at 152. In *Rom-*

bom, Judge Sotomayor hypothesized that shooting a passenger who refused to be quiet during the presentation of safety instructions would be an "outrageous or unreasonable" rendering of services. 867 F. Supp. at 222-23. Rude and unprofessional actions, such as treating passengers like children, however, did not rise to the necessary level of outrageousness, and were therefore preempted. *Id.* at 222-24; *see also Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 399-401 (S.D.N.Y. 2004) (claims of negligent and intentional infliction of emotional distress, as well as tort claims based on rudeness and unprofessional conduct, are preempted because airline's conduct in ejecting plaintiff from her seat was not "outrageous or unreasonable"). Conversely, the *Ruta* Court found that a slander claim was not preempted, and implied that claims involving assault, battery, false arrest, or false imprisonment would not be preempted because they would constitute outrageous or unreasonable behavior. *Id.*

The Court dislikes bumping as much as any passenger with a schedule to keep or a life to live. Keeping passengers waiting in a terminal for two days is certainly terrible customer service. However, even assuming that plaintiffs' allegations are true, as a matter of law the conduct described by plaintiffs does not rise to the level of outrageous or unreasonable behavior. Plaintiffs allege no assault, battery, false arrest, false imprisonment, slander, or any similar action that could be described as outrageous or unreasonable. Rather, plaintiffs merely allege the sort of rude, indifferent, and uncaring treatment that is all too common in customer service businesses. El Al's treatment of plaintiffs, therefore, satisfies the

third prong of the *Rombom* test, and plaintiffs' tort action is preempted by the ADA.

CONCLUSION

Plaintiffs' motion for reconsideration is denied. The Clerk of the Court is respectfully directed to close plaintiffs' motion (Doc. #24) and defendant's motion to respond (Doc. #27) for purposes of all internal reports.

SO ORDERED.

Dated: New York, New York
July 28, 2006

/s/ GERARD E. LYNCH
GERARD E. LYNCH
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

December 14, 2004
04 CIV 9803
JUDGE LYNCH

TOBIAS WEISS and GERTRUDE O. WEISS,

Plaintiffs,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

COMPLAINT

Jurisdiction and Venue

1. This action is brought under the *Airline Deregulation Act* ("ADA") *49 U.S.C. § 49713*; the regulations thereunder of the Federal Aviation Administration ("FAA") particularly *14 Code of Federal Regulations* ("CFR") *§ 250.1 et seq.*; and the *Federal Aviation Act, 49 U.S.C. § 1374(b)*.

2. Venue is proper in this district pursuant to *28 U.S.C. § 1391(a)*. All the events on which this action is based, occurred in this district. The defen-

dant is also subject to personal jurisdiction in this district.

The Parties

3. The plaintiffs, Tobias Weiss and Gertrude O. Weiss (herein also referred to as the "passengers") are individuals who reside at Stamford, Connecticut and are citizens of the State of Connecticut.

4. The defendant El Al Israel Air Lines, Ltd. (herein also referred to as the "airline") is in the business of furnishing air transportation to passengers who pay its charge for such transportation. The airline is incorporated in Israel and has its principal office in the United States at 120 W. 45th Street, New York, New York 10036.

First Count

5. The passengers bought two tickets with confirmed reserved seats, one for each of them, for their round-trip air transportation by the airline from New York City (Kennedy airport) to Jerusalem (Ben-Gurion airport) and return.

6. The passengers paid $2,434 for the two round-trip tickets.

7. The flight from New York City to Jerusalem was scheduled to depart on March 31, 2004 at 6:30 P.M.

8. The passengers arrived at Kennedy airport on that date at 5:28 P.M., were cleared by the airline security, but were denied boarding on the airline's plane with the destination of Jerusalem.

9. The passengers were told that the airline had given their reserved seats on that flight to other passengers.

10. The airline knowingly and deliberately overbooked and oversold that flight, selling more tickets for that flight than it had seats for passengers on the plane, and then engaged in the practice of "bumping" passengers from the flight.

11. The airline then induced the passengers to spend two successive days, during airline business hours, at the airline terminal at Kennedy airport (on March 31 and April 1, 2004), by putting the passengers on standby status and holding out the prospect of receiving transportation from the airline to Israel. The airline even took an additional $100 from the passengers to apply to such transportation in business class.

12. Notwithstanding the foregoing, the airline failed and refused to furnish any transportation to the passengers whom it had "bumped." They then bought and obtained transportation to Israel on British Airways.

13. In violation of regulations of the United States Department of Transportation, the airline or its agents did not inform the passengers that it was engaged in overbooking and that the passengers might be denied the transportation for which they bought their airline tickets.

14. In violation of regulations of the United States Department of Transportation, no notice was included, with the tickets sold to the passengers for their airline transportation, that the flight would be

overbooked and that the passengers might be denied seats on the flight.

15. In violation of regulations of the United States Department of Transportation, the airline never displayed at its terminal or gave the passengers at the terminal any notice of its overbooking practices, its procedure regarding resulting loss of seating on a flight, or compensation for depriving passengers of transportation for which they had bought tickets.

16. In violation of regulations of the United States Department of Transportation, the airline did not furnish the passengers the required statements after they were denied boarding by the airline.

17. The airline did not refund to the passengers any amount they paid for the tickets as to which they were denied transportation by the airline. The airline, in giving the same seats to other paying passengers, was paid twice for the same seats.

18. The passengers never received any compensation or payment for being bumped by the airline.

19. The airline is liable in damages to the passengers for violating the applicable Federal regulations and the rights of the passengers thereunder and for failing to furnish the required air transportation.

Second Count

20. Paragraphs 1 through 19 are hereby repeated and alleged.

21. During the two days that the passengers were induced by the airline to be at its terminal at Kennedy airport, they were constantly caught up in

dealing with airline employees and in complying with airline procedures to gain admission to a flight to Israel.

22. During those two days, passengers suffered physical fatigue and exhaustion in having to move about the airline's facilities in response to the airline procedures and the suggestions of its employees.

23. During those two days, the airline and its employees' actions with respect to the passengers was wanton, oppressive, indifferent, and uncaring, shunting the passengers around from place to place just to get rid of them.

24. During those two days, as a result of the foregoing the passengers were subjected to emotional stress, and worry and anxiety, and great inconvenience, in being denied the transportation on which they depended.

25. The airline is liable in damages to the passengers for their physical and emotional suffering and great inconvenience caused by the airline's failure to furnish the transportation represented by the tickets it sold to them and by the conduct of the airline and its employees during those two days for which the airline induced the passengers to remain at the airport.

Third Count

26. Paragraphs 1 through 25 are hereby repeated and alleged.

27. The passengers contracted with the airline for air transportation from New York to Israel, for which the airline was paid.

28. That contract, between the passengers and the airline, included the implied requirement that the airline would observe all applicable requirements of the United States and its Department of Transportation.

29. The airline deliberately failed and refused to furnish the required transportation.

30. The airline deliberately failed and refused to observe applicable requirements of the United States Department of Transportation.

31. The airline is liable to the passengers for those contract breaches by the airline.

WHEREFORE, plaintiffs demand judgment against defendant as follows:

(1) The sum of $100,000, interest, and costs.

(2) Such other and further relief as the court may deem proper.

Dated: December 14, 2004.

/s/ TOBIAS WEISS
Tobias Weiss, *Pro Se*
1766 Bedford Street
Stamford, Ct. 06905
(203) 348-6196

/s/ TOBIAS WEISS
Tobias Weiss
Attorney for Gertrude O. Weiss
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Demand For Jury Trial

Plaintiffs hereby demand a jury trial for all causes of action in this complaint on behalf of all plaintiffs herein.

/s/ TOBIAS WEISS
Tobias Weiss, *Pro Se*
1766 Bedford Street
Stamford, Ct. 06905
(203) 348-6196

Dated: December 14, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket No. 04 CV 9803 (GEL)

TOBIAS WEISS and GERTRUDE O. WEISS,

Plaintiffs,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

ANSWER OF EL AL

Defendant EL AL ISRAEL AIRLINES, LTD. (hereinafter "EL AL"), by and through its undersigned attorneys, for its Answer to the Complaint of Plaintiffs herein:

1. Denies the allegations in paragraph 1 of the Complaint.

2. Denies the allegations in paragraph 2 of the Complaint, except El Al admits that venue is proper pursuant to 28 U.S.C. § 1391(a) and that El Al is subject to personal jurisdiction in this district.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 of the Complaint.

4. Denies the allegations in paragraph 4 of the Complaint, except El Al admits that is a foreign air carrier, as defined in 49 U.S.C. § 40102, engaged in the international carnage of persons by aircraft for reward pursuant to permit issued by the United States Department of Transportation.

AS TO THE ALLEGED FIRST COUNT

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the Complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the Complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Complaint.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Complaint.

10. Denies the allegations in paragraph 10 of the Complaint, except El Al admits it is entitled to overbook its flights pursuant to applicable law and regulation and the contract between the parties and avers that Plaintiffs knew or should have known of such practice.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Complaint.

13. Denies the allegations in paragraph 13 of the Complaint.

14. Denies the allegations in paragraph 14 of the Complaint.

15. Denies the allegations in paragraph 15 of the Complaint.

16. Denies the allegations in paragraph 16 of the Complaint.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 17 of the Complaint and denies the allegations in the second sentence of paragraph 17 of the Complaint.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 of the Complaint.

19. Denies the allegations in paragraph 19 of the Complaint.

AS TO THE ALLEGED SECOND COUNT

20. Answering paragraph 20 of the Complaint, El Al repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 19, inclusive, of this Answer with the same force and effect as if fully set forth herein.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21 of the Complaint.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the Complaint.

23. Denies the allegations in paragraph 23 of the Complaint.

24. Denies the allegations in paragraph 24 of the Complaint.

25. Denies the allegations in paragraph 25 of the Complaint.

AS TO THE ALLEGED THIRD COUNT

26. Answering paragraph 26 of the Complaint, El Al repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 25, inclusive, of this Answer with the same force and effect as if fully set forth herein.

27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27 of the Complaint.

27. Denies the allegations in paragraph 27 of the Complaint.

28. Denies the allegations in paragraph 28 of the Complaint.

29. Denies the allegations in paragraph 29 of the Complaint.

30. Denies the allegations in paragraph 30 of the Complaint.

31. Denies the allegations in paragraph 31 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

32. The Complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

33. This Court lacks jurisdiction over the person of Defendant El Al in that service of process was insufficient.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

34. The claims for relief asserted in Plaintiffs' Complaint, if any, are preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b).

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

35. Defendant El Al is not liable to Plaintiffs, or its liability if any is limited, pursuant to the provisions of the Montreal Convention.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

36. Defendant El Al is not liable to Plaintiffs, or its liability if any is limited, pursuant to its tariffs filed with the U.S. Department of Transportation.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

37. Defendant El Al is not liable to Plaintiffs, or its liability if any is limited, pursuant to its Conditions of Contract.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

38. Pursuant to Article 17 of the Montreal Convention, El Al is not liable to Plaintiffs in that there was no accident.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE

39. Pursuant to Article 20 of the Montreal Convention, El Al is not liable to Plaintiffs or its liability, if any, should be reduced.

WHEREFORE, Defendant El Al Israel Airlines, Ltd. demands judgment dismissing the Complaint or that its liability, if any, be limited in accordance with applicable law, regulation or contract.

Dated: New York, New York
January 18, 2005

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(3)

No. 08-1259

FILED
MAY 14 2009
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TOBIAS WEISS, GERTRUDE O. WEISS,

Petitioners,

—v.—

EL AL ISRAEL AIRLINES, LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether "service" in the express preemption provision of the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), refers only to "the provision of air transportation to and from various markets at various times" as interpreted by the Ninth Circuit in *Charas*,[1] or refers to "the provision or anticipated provision of labor from the airline to its passengers" as interpreted by the Second Circuit in *Weiss*,[2] in light of the reasoning in *Rowe*.[3]

II. Whether the tort law claim alleged by petitioners relates to a "service" and is, therefore, preempted by the express preemption provision of the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1).

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[1] *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (*en banc*).

[2] *Weiss v. El Al Israel Airlines, Ltd.*, No. 07-4113, 2009 WL 367559, at *2 (2d Cir. Feb. 3, 2009) (internal quotation marks omitted).

[3] *Rowe v. New Hampshire Motor Transport Ass'n*, — U.S. —, 128 S. Ct. 989 (2008).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent El Al Israel Airlines, Ltd. does not have a parent company.

KNAFAIM HOLDINGS LIMITED is a publicly held company that owns 10% or more of the stock of El Al Israel Airlines, Ltd.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is unpublished. It is unofficially reported at 2009 WL 367559 (2d Cir. Feb. 3, 2009) and is reproduced in the Appendix to the Petition for A Writ of Certiorari at A1a - A6a.[4] The opinions of the district court are officially reported at 433 F. Supp. 2d 361 (S.D.N.Y. 2006) (referred to herein as *Weiss I*) and 471 F. Supp. 2d 356 (S.D.N.Y. 2006) (referred to herein as *Weiss II* and reproduced in the Appendix to the Petition at A9a - A20a).

STATUTORY PROVISION INVOLVED

> **(b) Preemption.—(1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> **(2)** Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

[4] References preceded by "A" refer to pages in the Appendix to the Petition for A Writ of Certiorari filed by Petitioners.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.—Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the author-

> ity of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and
>
> **(ii)** does not apply to the transportation of household goods, as defined in section 13102 of this title.
>
> (C) Applicability of paragraph (1).—This paragraph shall not limit the applicability of paragraph (1).

49 U.S.C. § 41713(b).

STATEMENT OF THE CASE

Plaintiffs[5] seek damages allegedly sustained as a result of having been "bumped" from their El Al flight on March 31, 2004. A23a - A25a.[6]

Plaintiffs had purchased tickets from EL AL for round trip air transportation between John F. Kennedy International Airport in New York ("JFK") and Ben-Gurion Airport in Jerusalem on a flight scheduled to depart on March 31, 2004. A22a. Upon their arrival at the airport, EL AL personnel

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[5] Petitioners were plaintiffs in the courts below and are referred to throughout this Brief in Opposition as "plaintiffs." Respondent El Al Israel Airlines, Ltd. was the defendant in the courts below and is referred to in this Brief as "defendant" or "El Al."

[6] The facts are taken from the plaintiffs' complaint, which must be accepted as true, inasmuch as the legal issue was raised in the context of a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6). *See Haddle v. Garrison*, 525 U.S. 121, 125 (1998).

informed plaintiffs that they had been bumped from their flight and that, although there would be a delay, they would be placed on a stand-by list and would eventually be seated on a later flight to Jerusalem. A23a - A24a. After returning to JFK over the next two days and being unsuccessful in obtaining transportation on El Al, plaintiffs purchased tickets on a British Airways flight. A23a.

In their complaint, plaintiffs alleged three claims for relief, all of which included the allegation that they were bumped from the El Al flight. A23a - A25a. Each claim for relief had an allegedly different legal basis. The Second Count, at issue here, sounds in tort and alleged that the conduct of El Al inducing plaintiffs to return to JFK for the possibility of taking a later El Al flight, in lieu of the flight from which they were bumped, was "wanton, oppressive, indifferent, and uncaring" that caused "emotional stress, and worry and anxiety, and great inconvenience" for which plaintiffs were entitled to damages "for their physical and emotional suffering and great inconvenience caused by the airline's failure to furnish the transportation represented by the tickets it sold to them and by the conduct of the airline and its employees." A24a - A25a.

El Al moved to dismiss plaintiffs' claims pursuant to FED. R. CIV. P. 12(b)(6) on the ground, *inter alia*, that plaintiffs' claims were preempted by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(1).

The district court[7] found that the claim for "tort damages for physical and emotional suffering, and

[7] Jurisdiction in the district court was based upon federal question, 28 U.S.C. § 1331, and diversity of citizenship, 28 U.S.C. § 1332. *Weiss I*, 433 F. Supp. 2d at 363-64.

for great inconvenience . . . is clearly preempted by the ADA, and is dismissed." *Weiss I*, 433 F. Supp. 2d at 370 (internal quotation marks and citation omitted).[8] Plaintiffs then moved for reconsideration of the dismissal of their tort claim. In denying plaintiffs' motion for reconsideration, the district court expanded on its reasoning and upheld dismissal of the tort claim as preempted by the ADA. *Weiss II*, 471 F. Supp. 2d at 359-62, A13a - A20a.

On appeal, plaintiffs argued that their tort claim was not preempted by the ADA because their tort claim was not related to a "service" as interpreted by the Ninth Circuit in *Charas v. Trans World Airlines*, 160 F.3d 1259 (9th Cir. 1998) (*en banc*), and by the Third Circuit in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d cir. 1998). In *Charas* the Ninth Circuit interpreted "service" narrowly.

> "[S]ervice," when juxtaposed to "rates" and "routes," refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, "This airline provides service from Tucson to New York twice a day.") To interpret "service" more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does.

Charas, 160 F.3d at 1265-66.

---

[8] The First Count based upon failure to comply with federal regulations was dismissed on the ground that no private right of action existed. *Weiss I*, 433 F. Supp. 2d at 371. The Third Count for breach of contract was ultimately settled with plaintiff reserving a right to appeal dismissal of their tort claim in the Second Count. A7a - A8a.

The Second Circuit, however, had already expressly rejected the *Charas* interpretation of "service." *Air Transport Association of America, Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) (hereinafter "ATA"). In *ATA* the court analyzed the effect of the ADA preemption provision on a New York statute requiring airlines to provide passengers with specific amenities during lengthy ground delays and, in holding that the statute was preempted, found that the interpretation in *Charas* was inconsistent with the broader reading of "service" in *Rowe v. New Hampshire Motor Transport Ass'n*, — U.S. —, 128 S. Ct. 989 (2008). *See ATA*, 520 F.3d at 223 ("in *Rowe* . . . the Court necessarily defined 'service' to extend beyond prices, schedules, origins, and destinations").

In this case, therefore, the Second Circuit applied its holding in *ATA* to the tort claim asserted by plaintiffs. The court, citing *ATA*, noted that "a majority of the circuits had found the term "service" to refer [ ] to the provision or anticipated provision of labor from the airline to its passengers and [to] encompass[ ] matters such as boarding procedures, baggage handling, and food and drink." *Weiss v. El Al Israel Airlines*, 2009 WL 367559, at *1, A5a (internal quotation marks omitted). It then affirmed dismissal of plaintiffs' tort claim, stating:

> The El Al actions challenged by the plaintiffs related "to the provision or anticipated provision of labor from the airline" within the meaning of *ATA* . . . Moreover, this case falls squarely within the rationale of *ATA*, which, relying on *Rowe*, stressed Congress's overarching goal of assur[ing] that transportation rates, routes, and services

> reflected maximum reliance on competitive market forces . . . Like an airline's failure to provide food or water to passengers stranded on the runway (which was at issue in *ATA* . . .), the practice of "bumping," although notoriously maddening to passengers, is a practice subject to competitive market forces. We therefore conclude that El Al's actions related to the airline's "service," and that the plaintiffs' tort claim is thus preempted by section 105 of the ADA.
> . . .

Weiss, 2009 WL 367559, at *2, A5a (internal quotation marks and citations omitted).

REASONS FOR DENYING THE PETITION

I. Any Split Among the Circuits has been Resolved by *Rowe v. New Hampshire Motor Transport Ass'n*, — U.S. —, 128 S. Ct. 989 (2008)

The Second Circuit essentially acknowledged that its decision conflicted with the decisions of the Ninth Circuit in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (*en banc*), and the Third Circuit in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d cir. 1998),[9] interpreting

[9] Although Justice O'Connor stated that the "Third Circuit has expressly agreed with [the Ninth Circuit's] approach" (*Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1058 (2000) (O'Connor, J., dissenting to denial of *cert.*)), there is a question as to the extent which the Third Circuit has adopted the Ninth Circuit's interpretation of "service." *Khan v. American Airlines, Inc.*, No. 08 CV 5246, 2008 WL 5110852, at *3 n.3 (S.D.N.Y.

§ 41713(b)(1). *Weiss v. El Al Israel Airlines, Ltd.*, 2009 WL 367559, at *1, A4a. Both *Charas* and *Taj Mahal*, however, were decided before the Court's decision in *Rowe v. New Hampshire Motor Transport Ass'n*, — U.S. —, 128 S. Ct. 989 (2008), interpreting 49 U.S.C. § 14501(c)(1). And although *Rowe* dealt with the preemptive effect of § 14501(c)(1), because the preemption language in § 14501(c)(1) was copied from § 41713(b)(1) the analysis in *Rowe* relied upon the decisions in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), interpreting § 41713(b)(1).

Inasmuch as the *Charas* court concluded that "service" in § 41713(b)(1) is limited "to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided" while *Rowe* found that the regulation of the manner in which a motor carrier provided delivery services of tobacco products in Maine was preempted under § 14501(c)(1) as a "service," it is abundantly clear that the term "service" in § 41713(b)(1) cannot be limited to encompass only the frequency and scheduling of transportation or selection of transportation markets. As such, the Second Circuit was correct to find that *Charas* is inconsistent with *Rowe*. *ATA*, 520 F.3d at 223; *Weiss*, 2009 WL 367559, at *1. Presumably the Ninth Circuit and Third Circuit would reach the same conclusion, thus rendering unnecessary any need for this Court to consider again the meaning of "service" in § 41713(b)(1).

Moreover, the rationale and principles enunciated in *Rowe* are only now being considered by courts in

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Nov. 26, 2008); *see Panitch v. Continental Airlines*, No. 06-3611, 2008 WL 906240, at *5 (D.N.J. Mar. 31, 2008).

the Ninth Circuit.[10] *See American Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009) (holding, in light of *Rowe*, that 49 U.S.C. § 14501(c)(1) likely preempts provisions of mandatory concession agreement with City relating to "service" and entitling plaintiffs to preliminary injunction); *Blackwell v. Skywest Airlines, Inc.*, No. 06 CV 0307, 2008 WL 5103195, at *16 - *18 (S.D. Cal. Dec. 3, 2008) (finding preemption by § 41713(b)(1) of state wage law claims under *Charas* without reliance on *Rowe*); *but see Hanni v. American Airlines, Inc.*, No. 08-00732, 2008 WL 1885794, at *6 - *7 (N.D. Cal. 2008) ("the Ninth Circuit's definition of 'service' in *Charas* does conflict with the Supreme Court's subsequent opinion in *Rowe*, which 'necessarily defined "service" to extend beyond prices, schedules, origins, and destinations' " but rationale of *Rowe* not applicable to state-based tort law claims). Under the circumstances, the Ninth Circuit should be given the opportunity to reconsider its interpretation of § 41713(b)(1) in *Charas* in light of *Rowe*, and it is unnecessary for this Court to devote scarce judicial resources to correct an interpretation that is highly likely to be rendered an historical anomaly in the near future.

II. Independent State Law Grounds Exist to Affirm the Decision Below and it is Unnecessary to Resolve any Arguable Split Among the Circuits

It is well-settled that a party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even

[10] As of the date of this Brief in Opposition, it does not appear that the Third Circuit has considered the effect of *Rowe* on *Taj-Mahal*.

considered by the District Court or the Court of Appeals." *14 Penn Plaza LLC v. Pyett*, — U.S. —, 129 S. Ct. 1456, 1474 (2009) (internal quotation marks omitted), *quoting Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989). Pursuant to SUP. CT. R. 15.2, defendant El Al advises that in the event a Writ of Certiorari is granted it will argue that the decision below may be affirmed on independent state law grounds.[11]

Plaintiffs' underlying claims for inconvenience and alleged mistreatment in the terminal at JFK, standing alone, have no basis in state law regardless of whether or not they stem from the bumping. Plaintiffs claimed that the actions of El Al were "wanton, oppressive, indifferent, and uncaring" causing "emotional stress, and worry and anxiety, and great inconvenience . . . [and] physical and emotional suffering." A25a. Although not denominated as such, plaintiffs' claims in the Second Count of the complaint are akin to intentional or negligent infliction of emotional distress.

Under New York law a cause of action for intentional infliction of emotional distress must allege conduct that is so outrageous and extreme that it is beyond the bounds of decency. *E.g.*, *McRedmond v. Sutton Place Restaurant & Bar, Inc.*, 851 N.Y.S.2d 478, 479, 48 A.D.3d 258 (1st Dept. 2008) ("a cause of action for intentional infliction of emotional distress must be supported by allegations of conduct 'so outrageous in character, and so extreme in degree, as to

[11] The argument outlined here was presented to, but not considered by, the Second Circuit below. *See* Brief for Defendant-Appellee El Al Israel Airlines, Ltd. at 21-23, *Weiss v. El Al Israel Airlines, Ltd.*, No. 07-4113, 2009 WL 367559 (2d Cir. Feb 3, 2009). The argument was not presented to the district court.

go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' ") (internal citation omitted); *Stauber v. New York City Transit Authority*, 781 N.Y.S.2d 26, 27, 10 A.D.3d 280, 281 (1st Dept. 2004).

In the context of evaluating whether or not the alleged activities of El Al constituted a "service" so as to be preempted, the district court had concluded that plaintiffs' claims regarding El Al's alleged conduct were not outrageous or extreme.

> [E]ven assuming that plaintiffs' allegations are true, as a matter of law the conduct described by plaintiffs does not rise to the level of outrageous or unreasonable behavior. Plaintiffs allege no assault, battery, false arrest, false imprisonment, slander, or any similar action that could be described as outrageous or unreasonable. Rather, plaintiffs merely allege the sort of rude, indifferent, and uncaring treatment that is all too common in customer service businesses.

Weiss II, 471 F. Supp. 2d at 362; A19a. That same conclusion applies if plaintiffs' tort claims are evaluated under New York law. Plaintiffs claims in the Second Count were, therefore, properly dismissed even if they could be considered separate and distinct from a "bumping" claim that is preempted by the ADA.

In the event El Al is correct in arguing that plaintiffs' tort claim is not legally viable under New York law, it will be unnecessary for this Court to consider whether or not plaintiffs' tort claim is preempted by the ADA. Under such circumstances, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: New York, New York
May 14, 2009

Respectfully submitted,

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(2)

No. 08-1259

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IN THE

Supreme Court of the United States

TOBIAS WEISS, GERTRUDE O. WEISS,

Petitioners,

—v.—

EL AL ISRAEL AIRLINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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House Report No. 95-121..... 1

Argument

The purpose of this reply in support of petitioners' application for a writ of certiorari, is as follows:

(1) The meaning of the word "service" in the Airline Regulation Act, 49 U.S.C. § 41713(b)(1), was made clear by Congress in enacting that statute.

The legislative history of that statute clearly shows that Congress used the word "service" in the context of making available or modifying airline transportation in a particular geographical area.

The singular (and not the plural) of the word "service" in the statute, was not used to mean how the airline treats its passengers and the responsibility of the airline for such treatment.

As an example, House Report No. 95-121 repeatedly shows that "serves" and "service" were used by Congress to mean furnishing airline transportation service. Thus, as some examples, the following appear in that legislative committee report:

> If an airline wishes to change the cities it serves or the price it charges, it first must seek permission from the CAB. (p. 3737)
>
> * * * *
>
> From the standpoint of the travelling public there was evidence that the pre-1975 regulatory system was discouraging experiments with low-fare service which could have benefited the industry and the public. (p. 3738)
>
> * * * *
>
> In dormant markets served by two or more carriers, CAB will be required to authorize replacement service in 60 days unless CAB finds that

> replacement service would be inconsistent with public convenience and necessity. (p. 3740-3741)
>
> * * * *
>
> Other important provisions of H.R. 12611 are the 10-year guarantee of continued air service for small communities * * * (p. 3741)
>
> * * * *
>
> H.R. 12611 modifies several provisions of section 406 to insure that the added competition resulting from H.R. 12611 will not have an undue impact on the local service carriers or the communities they service. (p. 3748)

Similarly, the bill was considered in the Senate, and then went to a Conference Committee. In all instances, the word "service" had the same meaning of airline service to a particular geographical location. Thus, as one example, the Conference Committee stated (*above U.S. Code Congressional and Administrative News, at 3786*):

> If any carrier terminates service for which it had previously received compensation, however, it shall no longer be eligible to receive compensation under Section 406 if that service is later resumed, but it will be able to apply for and receive compensation for such service under section 419.

As a further example of the legislative use of the word "service", the Conference Committee stated (*Id. at 3807*):

> The amendment also eliminates Federal jurisdiction over certain service which is essentially intrastate in nature. Under existing law, CAB

> has jurisdiction over air service between two cities in a State if the aircraft passes over places outside the state. The amendment provides that service between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside of the State. This provision does not apply to flights between the Hawaiian Islands which will continue to be regulated by the CAB.

It is clear that Congress intended the word "service" to mean the presence of airline transportation at or between geographical locations. The word "service" is not used in the statute to mean how the airline treats its customers. The statute was not intended to preempt a court suit based on state tort law.

(2) The legislative history of the statute shows no intent to insulate an airline from liability for its abusive treatment of a passenger. For its torts committed by an airline against a passenger, the airline remains liable under state law.

(3) *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008), does not insulate an airline from liability for its torts under state law. That decision does not resolve the conflict between the Court of Appeals for the Second Circuit and the Courts of Appeals for the Third and Ninth Circuits.

Conclusion

Respondent argues the merits of the second count of the complaint. We respectfully submit that to be improper at the present stage. Jury trial has been claimed in this case.

The statute (Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) does not prohibit the state tort law action.

Respectfully submitted,

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No. 08-1259

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PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

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PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

This petition for reconsideration is submitted pursuant to Supreme Court Rule 44(2), on the following grounds:

I. EL AL, AS A FOREIGN AIR CARRIER, DOES NOT HAVE THE BENEFIT OF THE PREEMPTION STATUTE, 49 U.S.C. § 41713(b)(1).

El Al is a foreign air carrier. There is no dispute of that fact.

The plain language of the statutory definitions and the preemption clause clearly excludes all foreign air carriers from the benefits of the preemption provision of the Airline Deregulation Act ("ADA") of 1978, as amended. Specifically, Congress expressly defines "air carrier" and "foreign air carrier" as mutually exclusive terms:

In U.S.C. § 40102(a)(2), "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation. In 49 U.S.C. § 40102(a)(21), "foreign air carrier" means a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation.

The ADA's express preemption provision, 49 U.S.C. § 41713(b)(1), states:

> . . . a State . . . may not enact or enforce a law, regulation, or other provision having the force or effect of law [1] related to a price route, or service [2] of an air carrier [3] that may provide

> air transportation under this subpart. [Numbers in brackets supplied]

The plain meaning of Clause 3 is to limit the benefit of preemption solely to those "air carriers" (that is, United States citizens) who are legally authorized to provide air transportation.

Hence, under the plain language of the statutory definitions, "air carrier" and "foreign air carrier" are mutually exclusive terms. An "air carrier" must be a United States citizen. A "foreign air carrier" must not be a United States citizen. As defined in the statute, a "foreign air carrier" cannot be an "air carrier", and vice versa. Only an "air carrier" may invoke the preemption affirmative defense. In sum, Congress explicitly excluded "foreign air carriers" from the benefits of the ADA's preemption provision in §41713(b)(1).

II. WITHOUT THE APPLICATION OF THE PREEMPTION STATUTE, THERE IS NO BASIS FOR DISMISSING THE SECOND COUNT OF THE COMPLAINT, AS WAS DONE BY THE COURT BELOW.

The only basis given for dismissing the second count of the complaint, the tort count, is the foregoing statute.

We are not discussing the substantive merits of the second count, even thought it is a permissible basis for recovery under New York Law, since that is a matter for the trial court.

We submit that the claimed statute does not apply here according to its express terms, and respectfully request that this court reconsider the denial of

review here, and permit us to proceed against this foreign air carrier under the tort count.

CONCLUSION

The preemption statute does not apply in this case.

Respectfully submitted,

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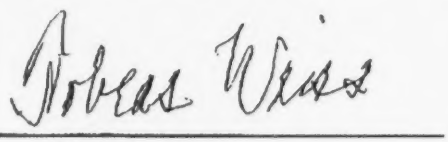
CERTIFICATE

This is to certify that this petition is presented in good faith and not for delay.



Tobias Weiss